

circuits. Id. ¶ 111. BA-NY asserts that the arrangement to which it agreed in the collaborative and the arrangement requested by MCI WorldCom are “distinctively different.” Id. In reality, the arrangements are exactly the same: both UNE and access T-1s ride a single DS-3 circuit, which then transports both UNE and access traffic. BA-NY does not explain the “difference” it purports to see, or why it will not permit the arrangement requested by MCI.

45. The only apparent basis for BA-NY’s position is its concern that a special access circuit should be converted to UNEs only when the “use” of the circuit “is appropriate.” BA-NY Reply Aff. ¶ 108. MCI WorldCom understands and agrees that it must pay appropriate rates for UNE and access uses of DS-3 circuits. MCI WorldCom has repeatedly assured BA-NY that it would not use UNE facilities in a manner inconsistent with FCC regulations. BA-NY has been unable to provide MCI WorldCom with any legitimate technical or legal basis for its refusal to allow UNE circuits and access circuits to be transported on the same DS-3. BA-NY’s Reply Affidavit likewise fails to justify its position.

46. BA-NY does not deny that its refusal to permit commingling of UNE and access circuits forces CLECs to build duplicative facilities when all traffic could be transported efficiently on a single DS-3 circuit. BA-NY’s policy forces CLECs to obtain additional capacity, on additional DS-3s, when existing capacity is available and could be used much more efficiently - all for no purpose other than to segregate UNEs and access facilities. BA-NY imposes no such requirements on itself, and it freely commingles local and access traffic on its common transport facilities in order to operate its network in a cost-effective manner. BA-NY’s refusal to allow CLECs to achieve the same efficiency remains both unreasonable and discriminatory.

Unbundled Switching

47. Network Design Request Intervals. In order to gain access to unbundled local switching and to provide service using total combinations of network elements, BA-NY requires CLECs to submit network design requests ("NDRs") for every switch where a CLEC intends to offer service. The NDR process is how BA-NY establishes a CLEC's presence at a BA-NY switch. It includes developing office dialing plans ("ODPs"), loading line class codes ("LCCs") into the switch and designing the CLEC's unbundled network for that specific environment. BA-NY now concedes that most NDR intervals must be negotiated. See BA-NY Reply Aff. ¶ 121. As BA-NY notes, a negotiated interval is required whenever a CLEC requests more than five office dialing plans ("ODPs"), see id., which means that a CLEC wishing to initiate any significant launch of local service using unbundled switching will not be able to rely on BA-NY's so-called "standard" NDR intervals.

48. BA-NY suggests that long negotiated intervals should be expected because of the complexity of the NDR process. See BA-NY Reply Aff. ¶ 123. In reality, it is not clear that BA-NY's process is even necessary in order to provide service using combinations of network elements or unbundled local switching. No other ILEC requires the type of NDR process demanded by BA-NY. In fact, before the Bell Atlantic/NYNEX merger, Bell Atlantic accepted local service requests ("LSRs") for unbundled local switching without requiring any preparatory process akin to the NDR. Moreover, even if the NDR process is necessary, it need not be as complex or time-consuming as BA-NY has made it. For example, in order to minimize the amount of time needed to complete its NDRs, MCI WorldCom requested that BA-NY establish line class codes exactly as they are for BA-NY. The only change from the existing codes is a difference in the information needed to route operator services and directory assistance calls in order for such calls to be branded as MCI WorldCom traffic.

49. BA-NY further argues that the four-month interval it provided to MCI WorldCom for the 169 switches in the New York City metropolitan LATA is more than reasonable because "[i]t would take years for a CLEC to provision its own switching facilities to serve the same geographic territory." Id. That is comparing apples to oranges. Unbundled network elements are intended to enable CLECs to compete rapidly, without the delay that would result if they were required to build their own duplicative networks. The amount of time it would take MCI WorldCom to reproduce BA-NY's network of switches is thus irrelevant -- what is relevant is whether BA-NY is providing timely access to unbundled switching so that competition using that network element is facilitated.

50. BA-NY entirely misses the point when it argues that MCI WorldCom has not yet ordered unbundled switching from the switches for which its NDR process has been completed. MCI WorldCom has not launched a ubiquitous service offering in New York primarily because of the lack of complete, automated OSS interfaces. The fact that MCI WorldCom has yet to place orders for unbundled local switching in no way undermines MCI WorldCom's need for timely completion of the NDR process. MCI WorldCom cannot launch a ubiquitous service offering if it is only able to provide service from a handful of switches in a particular LATA. That is why it is important that its entire NDR -- for all 169 switches in LATA 132 -- be completed in a timely manner. MCI WorldCom has recently learned that BA-NY will not complete MCI WorldCom's NDRs for all switches in BA-NY's New York network until April 23, 1999. Thus, it will not be possible for MCI WorldCom to provide local service statewide until then -- or even later, depending on the methods BA-NY provides to allow MCI WorldCom to test the switches before actual use by customers. Aside from the question of whether NDRs are necessary or should take such a long time to complete, the simple fact is that

BA-NY will not be prepared to accommodate a CLEC's statewide commercial launch of local service for another six months. And all this assumes, of course, that the automated OSS required to order unbundled local switching will be in place and working properly, which remains an open question at this time.

51. Moreover, MCI WorldCom will need to test the completed switches before placing live orders. MCI WorldCom asked BA-NY on October 8, 1998, to provide information on how we can test the switches' readiness; for example, MCI WorldCom would like to know whether test lines are available in each of the switches. In its October 23, 1998 response, BA-NY informed MCI WorldCom that it will test the switch translations internally, and that should MCI WorldCom wish to test those line class codes itself, MCI WorldCom will be required to place test customer orders into each of the 169 BA-NY switches in LATA 132 at regular rates for combinations of network elements. Despite MCI WorldCom's specific request that BA-NY work cooperatively in order to develop a method for testing these line class codes, BA-NY did not propose a more efficient and less expensive alternative, nor did BA-NY express any desire to work with MCI WorldCom to develop such a process. The issue of adequate testing of the NDR process must be resolved in order to enable MCI WorldCom to compete effectively using BA-NY unbundled local switching.

52. Customized Routing. BA-NY claims that use of Feature Group D ("FGD") signaling for operator services and directory assistance traffic is not technically feasible. See BA-NY Reply Aff. ¶ 124. The only support BA-NY offers for this assertion is discussions with its vendor, Nortel. In MCI WorldCom's discussions with that same vendor, MCI WorldCom has learned that Nortel can develop the switch functionality required to support operator services and directory assistance with both MOS signaling (for BA-NY retail customers)

and FGD signaling (for CLEC customers). Although this capability has not yet been deployed, there is no basis for concluding that it would be technically infeasible for it to be done.

Local Number Portability

53. BA-NY recites the deployment schedule for permanent local number portability ("LNP") in its Joint Affidavit and states that it has met that schedule to date. See BA-NY Initial Aff. ¶ 72. But in both its Initial and Reply Affidavits, BA-NY ignores the practical problems that have plagued its implementation of LNP in New York State. MCI WorldCom noted in its Initial Affidavit that BA-NY had mishandled eight of the twenty LNP orders that MCI had submitted as of that date.⁵ BA-NY responds that "MCI does not provide any detailed data which would allow BA-NY to analyze its claims," and that as far as BA-NY knows, all twenty of MCI's orders were completed on time. BA-NY Reply Aff. ¶ 142. This response ignores MCI's repeated communications to BA-NY of its specific problems with LNP implementation. MCI WorldCom provided BA-NY with detailed accounts of MCI's customer service outages and other problems as well as the numbers of the specific orders that were affected. Some of these communications from MCI WorldCom to BA-NY are attached to this Reply Affidavit as Exhibit 8. BA-NY assured MCI WorldCom that "we take these outages very seriously and have given them our utmost attention." See Email from Jenny Ross (Aug. 13, 1998) (Exhibit 8). For BA-NY to suggest now that it has handled MCI WorldCom's LNP orders flawlessly, and that MCI WorldCom has not provided sufficient data relating to its claims of LNP difficulties, is inconsistent with the facts as they have been known to BA-NY for many months.

⁵MCI WorldCom's Initial Affidavit referred mistakenly to twenty numbers, rather than twenty orders. See MCI WorldCom Initial Aff. ¶ 82. Because the MCI WorldCom customers seeking portability to date have been large customers, the twenty orders represent a significant number of actual lines ported.

54. The principal problem with BA-NY's provisioning of LNP is that BA-NY does not coordinate with MCI WorldCom on LNP orders associated with "special access" T-1s, which are T-1 circuits ordered by MCI WorldCom from BA-NY's access tariff to provide local service. For an LNP conversion to be successful, two sets of activities must be performed, one by MCI WorldCom and one by BA-NY. First, MCI WorldCom must initiate the number porting process by sending an "activate message" to the Number Portability Administration Center ("NPAC"). This message asks the NPAC to inform all carriers with access to the NPAC's database that the customer is now an MCI WorldCom customer and that calls coming to that customer's number should be routed to a specific MCI WorldCom switch. Second, BA-NY must reprogram its switch to remove the customer's number, and it must physically disconnect the customer's facilities from its main distribution frame. If the LNP conversion is coordinated between the two carriers -- that is, if technicians at the two companies were in communication and in full control of all related activities during the conversion -- then BA-NY could perform the necessary work on its side immediately following MCI's performance of the necessary work on its own side. This is the way the process should work. But because BA-NY is unwilling to coordinate in this manner, MCI WorldCom must obtain a confirmed date and time for the LNP conversion and simply hope that BA-NY adheres to that schedule. When unavoidable changes occur, MCI WorldCom must similarly trust that BA-NY will respond in an effective manner. If BA-NY performs its switch translations or disconnects the customer's facilities before the appointed time, then the result is a loss of service for the customer. That is precisely the problem that has occurred repeatedly on MCI's LNP orders.

55. There are two likely explanations for BA-NY's premature switch translations and facilities disconnections. One is simple human error -- for example, a technician

might read an order incorrectly and perform a disconnection at 7:00 a.m. when it should not be performed until 7:00 p.m. The more likely explanation for many of the outages experienced by MCI's customers is that BA-NY is not dealing adequately with changes to due dates and times for MCI's LNP orders. It has often been the case that MCI WorldCom has needed to change the date for number porting. BA-NY has said that it can accommodate such changes up until two hours before the LNP conversion is scheduled to occur, but it apparently has been unable to prevent iterations of original, superseded orders from remaining in the hands of programmers or technicians, who then proceed with BA-NY's side of the LNP conversion at the originally scheduled time. Because MCI WorldCom has not yet activated dial tone from its side, the customer is left without service. This has often been the case because the BA-NY access provisioning group has not provisioned the access facilities that connect the customer to the MCI WorldCom network in a timely manner.

56. Premature LNP cutovers by BA-NY are particularly problematic when BA-NY actually disconnects and then reuses the customer's facilities. If the physical facilities have been removed and reused, then the customer will experience a lengthy outage — sometimes as long as five business days — while new facilities are provisioned. To avoid this problem, MCI WorldCom has suggested that BA-NY make it a practice not to remove the customer's facilities until 24 to 72 hours after the scheduled number porting occurs. Then, if there is a problem with the conversion, the facilities will be available so that the customer's BA-NY service can be reestablished until the number porting process can proceed.

57. BA-NY alleges that due date postponements have led to many of MCI WorldCom's LNP problems and suggests that MCI WorldCom is to blame for those postponements. See BA-NY Reply Aff. ¶ 143. In fact, however, there are several possible

reasons for a CLEC's inability to proceed with a number portability conversion at the originally scheduled time, most of which are beyond the CLEC's control. First, the facilities required to connect the customer's premises to the CLEC's network might not be installed on time. This has been a particular problem for MCI WorldCom, due to BA-NY's failure to provide timely FOCs for special access T-1s and its failure to meet confirmed delivery dates. See MCI WorldCom Initial Aff. ¶¶ 62-63. As a result, it has become MCI WorldCom's practice to wait until it obtains a FOC for delivery of the access T-1 and then submit its order for LNP with a due date ten days after the FOC date for the T-1 installation to the MCI WorldCom customer. This is necessary because MCI WorldCom cannot assume that BA-NY will deliver the T-1 on the confirmed due date. Second, the access facilities provided by BA-NY might not work. Third, the vendor for the conversion work on MCI WorldCom's side might have to reschedule for its own reasons. Fourth, the end user customer might have to reschedule. Fifth, and finally, MCI WorldCom might not have completed the necessary preparatory work. Only the last of these potential delays is completely within MCI's control. Due date changes are simply an inevitable consequence of the involvement of several different parties and present challenges to all parties.

58. The problems with the BA-NY model for serving accounts described earlier in this affidavit -- primarily that BA-NY treats MCI WorldCom as access customer differently than MCI WorldCom the purchaser of unbundled network elements for local service -- are nowhere more evident than with respect to LNP cutovers. If MCI WorldCom orders a special access T-1 from the access side of BA-NY for an LNP cutover and the T-1 is going to be delayed beyond the FOC date, the access side of BA-NY does not contact the local side of BA-NY to stop or delay the cutover. Instead, MCI WorldCom is contacted by the BA-NY access account team and notified that there is going to be a delay. In turn, MCI WorldCom itself must then

contact the BA-NY local account team to reschedule the number porting. This additional step in the process is wholly unnecessary and leads to greater instances of delays and outages.

59. Finally, MCI WorldCom must unfortunately take issue with BA-NY's characterization of its cooperative efforts with MCI WorldCom as making "excellent progress" toward-resolution of these LNP problems. Reply Aff. ¶ 145. Many critical issues are still outstanding. For example, BA-NY has not committed to delay re-use of customer facilities until 24 to 72 hours after the scheduled number porting as described above. Nor has BA-NY followed through on a commitment to review the possibility of using MCI WorldCom's NPAC activation message as the trigger for initiating switch translations, so as to avoid premature translations. In addition, BA-NY must respond more quickly to requests for explanation after an LNP conversion has been mishandled. Finally, BA-NY should consider an approach adopted by BellSouth, which is deploying a direct interface from the NPAC to its provisioning systems. Number portability is of critical importance to MCI WorldCom. Simply put, without correct execution by BA-NY of LNP changes, MCI WorldCom will not be able to compete in New York.

PERFORMANCE MEASURES, STANDARDS, AND REMEDIES

60. BA-NY attempts to avoid the inadequacy of the performance measures, standards and remedies it proposes by misrepresenting the New York Carrier-to-Carrier proceeding as a consensus resolution of the performance requirements needed for section 271 compliance. The purpose of the carrier-to-carrier proceeding was only to develop measures to test on an interim basis. The list of interim guidelines was never intended to be deemed the "appropriate" list of measures and standards -- and certainly not remedies -- required to meet § 271 of the Telecommunications Act. There was no consensus at all on the issue of standards. To the contrary, MCI repeated frequently on the record, and in writing, that the interim

performance standards developed in the carrier-to-carrier proceeding were wholly inadequate to ensure service on just, reasonable and non-discriminatory terms. See e.g., Letter from K. Scardino (Feb. 13, 1998) (Exhibit 9).

61. The Carrier-to-Carrier proceeding did not even touch on the critical issue of what remedies are needed to prevent BA-NY from backsliding following § 271 entry. No one seriously questions that performance reporting and even standards are “meaningless” unless they are backed by self-executing remedies sufficient to modify BA-NY’s incentive to withhold cooperation from competitors, as the FCC found in its order conditionally approving the Bell Atlantic/NYNEX merger, and as the Department of Justice recently reaffirmed in its evaluation of BellSouth’s section 271 application for Louisiana. BA-NY never comes to grips with this fundamental fact: what good is a requirement that BA-NY provide service at a specified level if it can violate the requirement without any penalty, or with a remedy so trivial that it can be absorbed as a worthwhile cost of doing business and preserving market share? All of the hard work this Commission has devoted to performance reporting will do little to promote local competition if BA-NY is not given a strong incentive to meet pre-defined standards governing the quality and timeliness of service it must provide to competing local exchange providers.⁶ The important issue of what standards and remedies are needed cannot be avoided by pretending that the issue has been resolved — let alone by consensus — in the carrier-to-carrier proceeding.

62. Remedies. Even BA-NY seems to recognize this gap in the Carrier-to-Carrier proceeding, because it has presented a remedy proposal in its Prefiling Statement. The

⁶Sprint, whose incumbent LEC operates in 18 states, supports objective performance standards and self-executing remedies for failure to meet the objective standards. See Sprint Reply Comments at 8. Sprint concludes that the standards and remedies proposed by LCUG would not place an undue burden on an ILEC. Id. at 8 & n.15.

problem is that the remedies are totally inadequate. BA-NY has not even tried to justify the fundamental flaws with its proposed standards and remedy system, including:

- BA-NY creates false results by “re-scoring” statistically significant results that proved that discrimination occurred. A “performance score” for each metric in which the z score is well below -2 is arbitrarily rounded up to -2, z scores between -2 and -1 are arbitrarily rounded up to -1, and z scores between negative 0.1 and negative 0.9 are written off entirely as if parity actually occurred. Prefiling Statement at 37; see MCI WorldCom Initial Aff. ¶ 97.
- BA-NY excuses its own discriminatory performance one month at a time as long as it decides not to discriminate for the next two months. Prefiling Statement at 37. See MCI WorldCom Initial Aff. ¶ 98. This means that even though discrimination at the -2 z score level is deemed the maximum allowable discrimination that triggers the maximum remedies, a value only 1/10 less – -1.9 – can be excused entirely for 30 days at a time. See MCI WorldCom Initial Aff. ¶ 99.
- BA-NY aggregates multiple metrics into a single average for each mode of entry and assigns weights to each metric. This allows BA-NY to dilute any negative scores that remain for some functions (after the rescoring described above) with adequate performance for other functions. See MCI WorldCom Initial Aff. ¶ 100.
- For the so-called “critical measures” (which are in fact a very small subset of critical measures), BA-NY does not aggregate scores by mode of entry, but adds an entirely new loophole by aggregating results among CLECs. This allows it to engage in targeted discrimination against an individual CLEC.
- By proposing remedies that are based on discounts on future orders, the remedy scheme will effectively result in lower monetary payments the more successful BA-NY is in blocking local competition and forcing CLECs to scale back orders.

63. Assessing Parity. In addition to not even defending its remedy proposal, BA-NY then argues that even assessing parity on individual functions is not appropriate. BA-NY Reply Aff. ¶ 179. This is an astonishing argument, as it is equivalent to BA-NY stating that it should be permitted to engage in selective discrimination for any particular function it chooses.

64. Even more troubling is BA-NY's statement that it is not even possible or necessary for it to meet every measure each month. Id. It is important to remember that the performance model proposed by MCI WorldCom and other CLECs includes an agreed-upon statistical methodology that ensures the results are statistically significant. This means that BA-NY's argument that it is not possible or necessary for it to meet every measure is the same as saying it is not possible or necessary for it to avoid unlawful discrimination against CLECs. Of all the ways ILECs have attempted to avoid proper remedies for poor performance, this is the first time MCI WorldCom has seen an ILEC claim that discrimination is inevitable and not even necessary to prevent.

65. **Objective Performance Standards.** BA-NY further argues that fixed performance standards somehow "contravene" the requirement that BA-NY provide parity of service. This shows a fundamental misunderstanding of BA-NY's duties, if not a deliberate attempt to hinder competition and avoid the requirements of the Telecommunications Act. The Act very clearly requires both nondiscriminatory and reasonable service, which has been defined to mean nondiscrimination and a level of service that allows new entrants a meaningful opportunity to compete. Simply put, objective performance standards provide a minimum, fixed floor below which an ILEC's service should not fall. This floor ensures that CLECs are given certainty of service on reasonable terms -- a meaningful opportunity to compete. The parity standard ensures that if BA-NY provides service to itself at a level above the floor, CLECs are entitled to the same level of service. Thus, the reasonableness floor and the nondiscrimination requirement are independent and complementary requirements, and hardly contravene each other.

66. BA-NY does not even attempt to rebut the basic logic and overwhelming competitive need for objective standards, such as to allow CLECs to plan their own internal operations, to prevent CLECs and their customers from getting wildly varying levels of service, and to ensure that CLECs' ability to compete is not completely at the mercy of what BA-NY self-reports as parity.

67. If parity were the only standard, MCI WorldCom would have no idea on any given day when it will receive an OSS response, a loop, or other type of service or functionality from BA-NY. A parity determination is made after the fact based on reports BA-NY later prepares. MCI WorldCom has no predetermined commitment when it or its prospective customers will receive functionality and services from BA-NY. Only weeks or months later month will MCI WorldCom receive a report defining after-the-fact what "parity" was in a prior month. As BA-NY's reports demonstrate, the definition of "parity" can fluctuate wildly from month to month, making it impossible for MCI WorldCom to effectively plan internal operations, and make commitments to end users, based on complete uncertainty when BA-NY will deliver the "raw materials" of local service.

68. By contrast, BA-NY, on any particular day, knows the time it will take for a service to be performed and can guarantee this interval to its own customers. This is because when a BA-NY representative is speaking to a customer, he or she knows the current workload, plus any other possible delaying factors, and is able to accurately schedule when service will be performed and completed. Moreover, if after guaranteeing an interval to a customer, something happens to delay completion of the activity, BA-NY can immediately contact the customer and inform him of the expected delay. MCI WorldCom's representatives do not have this information and can only speculate to its customers, based on old quarterly reports and guesses

as to how BA-NY is currently performing, when a function will be performed and completed. Clearly, under these circumstances, MCI WorldCom is at an extreme competitive disadvantage.

69. Indeed, the fact that BA-NY has already agreed to some objective standards (for example, in its August 21 "milestone" letter to the Commission) contradicts its claim that objective standards are inappropriate. The only real issue, then, is ensuring that objective standards be in place for every important function that allows BA-NY to degrade service to CLECs and their customers, and not just for a handful of functions.

70. It is noteworthy that of all the objective standards MCI WorldCom has proposed, BA-NY can point to only one that it claims is unreasonable (clearing out-of-service conditions — BA-NY Reply Aff. ¶ 172). Although MCI WorldCom does not agree with BA-NY's critique of this standard, it begs the issue. That there may be debate as to the precise interval that should be set for each function is not in any way inconsistent with the point that a standard should be developed for each function.

71. In terms of establishing particular standards, it is significant that BA-NY has ignored repeated requests to submit internal data proving that any of the other proposed objective standards are unreasonable. If Bell Atlantic had data to back up that assertion, it would have and should have submitted it. In the absence of such data, the Commission should adopt MCI WorldCom's proposed standards.

72. "Missing" Functions. MCI WorldCom explained in its Initial Affidavit that there are a number of functions we depend on BA-NY to deliver that BA-NY has not even proposed to measure, thus preventing a determination whether BA-NY is providing service on reasonable and nondiscriminatory terms. BA-NY's main response is to quibble with the word "missing." BA-NY argues that a group of measures was established in the carrier-to-carrier

proceeding, and that others are being worked out, so no measures are "missing." But this should not be a shell game: either a function is important to local competition and should be measured and reported at a meaningful level of detail, or the measure is unimportant. That should be the only question under § 271— not word games about whether the measure is or is not being tested in a separate proceeding.

73. BA-NY apparently recognizes this, because it eventually attempts to justify its failure to report some of the measures. For example, BA-NY claims that "percent rejects" should not be measured because it is a measure of CLEC order quality, not BA-NY's performance. That is untrue, and the FCC has already twice rejected the same argument. The FCC has found that a high percentage of rejects is a "major concern" and shows that CLECs are not obtaining nondiscriminatory access to the BOC's ordering and provisioning functions. For example, a high percentage of rejects can be indicative that the BOC is not training the CLECs properly or giving adequate specifications needed for accurate orders.⁷

74. In certain instances, CLECs receive order rejections and must resubmit orders for failures on the part of the ILECs' systems or lack of notice or training on changed formats and processes for order entry. Other times orders are rejected with no explanation. Moreover, even when an order does contain multiple errors, such as syntax errors, ILECs often reject the order and notify the CLEC of only one of the errors. The CLEC then corrects the error, only to have the new order rejected because the ILEC failed to identify other problems

⁷See In the Matter of Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271, ¶ 127 n. 437 (rel. Oct. 13, 1998)(percent rejects shows whether the competing carrier is able to provide service to a customer in substantially the same amount of time as BellSouth).

with the order. This results in the same order unnecessarily being rejected over and over again. Further, RBOCs often change order submission requirements slightly without informing us, causing our orders to reject. Thus, it is simply untrue to suggest that percent rejects pertains only to the quality of CLEC orders, and not to BA-NY's performance.

75. Finally, BA-NY contends that ongoing audits of its performance reports are not needed because the KPMG test includes a review of measurements and procedures. To MCI WorldCom's knowledge, KPMG has not been engaged to audit BA-NY's actual data on an ongoing basis, including its "parity" reports following 271 entry. BA-NY will obviously have every incentive in the future to report that it is delivering parity, and absolutely no incentive to admit where its performance is inadequate or discriminatory. The notion of merely trusting BA-NY to submit accurate reports in the future, based on a one-shot KPMG audit of procedures today, is extremely troubling.

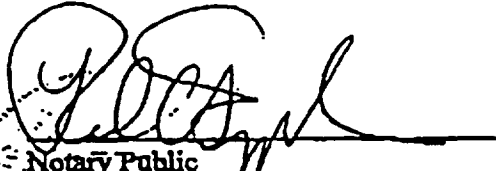
CONCLUSION

This concludes our Joint Reply Affidavit on Behalf of MCI WorldCom, Inc.

On this 26 day of October 1998, I hereby swear under penalty of perjury that
the foregoing is true and correct to the best of my knowledge and belief.


Annetto Guariglia

Robert Lanier


Notary Public
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No. 4900295
Qualified in Westchester County
Commission Expires 12/8/99

Notary Public

Sherry Lichtenberg

Clifford Dinwiddie

Notary Public

Notary Public

CONCLUSION

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Annette Guariglia

Robert Lanier
Robert Lanier

Notary Public

Manda J. Kirk
Notary Public
Commission Expires 8/21/2000

Sherry Lichtenberg

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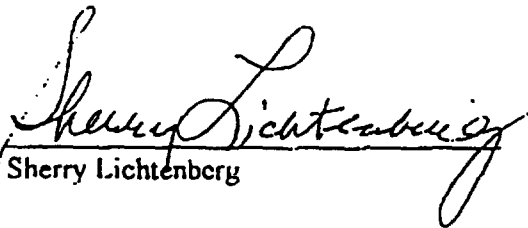
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Annette Guariglia

Robert Lanier

Notary Public

Notary Public


Sherry Lichtenberg

Clifford Dinwiddie


Notary Public

Notary Public

My Commission Expires June 14, 1999

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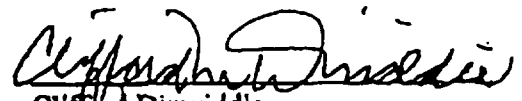
Annette Guariglia

Robert Lanier

Notary Public

Notary Public

Sherry Lichtenberg


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Notary Public

My commission expires 6-30-2002

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MCI TELECOMMUNICATIONS CORP., et al.

Plaintiffs,

v.

NEW ENGLAND TELEPHONE & TELEGRAPH CO.)
d/b/a BELL ATLANTIC-MASSACHUSETTS, et al.)

Defendants.)

Civil Action No.
98-CV-12375 (RCL)

OPENING BRIEF OF MCI TELECOMMUNICATIONS CORPORATION
AND MCIMETRO ACCESS TRANSMISSION SERVICES, INC.

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DATED: April 30, 1999

INTRODUCTION AND SUMMARY OF ARGUMENT

This action arises out of decisions of the Massachusetts Department of Telecommunications and Energy ("DTE") that implement the local competition provisions of the Telecommunications Act of 1996 ("the Act" or "the 1996 Act"). See 47 U.S.C. §§ 251-261.¹ MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (collectively "MCI") have challenged aspects of an "interconnection agreement" between MCI and New England Telephone & Telegraph Company, d/b/a Bell Atlantic-Massachusetts ("BA-MA") that, pursuant to the Act, was arbitrated and approved by the DTE. Although MCI's complaint focuses on two specific issues,² the fundamental question presented is whether that agreement is consistent with the Act and with the Federal Communications Commission ("FCC") regulations that implement the Act. Only an agreement that complies fully with the Act and these regulations will serve Congress's purpose of creating meaningful competition in the local telephone exchange markets.

Recognizing that the time and expense associated with replicating the ubiquitous network of incumbent local exchange carriers ("LECs") such as BA-MA are prohibitive, Congress mandated that new entrants into local telecommunications markets be allowed access to that network. As discussed in more detail below, new entrants such as MCI may purchase access to individual components of the incumbent LEC's network (called "unbundled network elements"), which the new entrant can then use to provide its own service. New entrants may also purchase telecommunications services from the incumbents and resell those services to its own customers. Because neither of these entry strategies could succeed if the prices charged by incumbent LECs are too high, Congress

^{1/} The Telecommunications Act, Pub. L. No. 104-104, 110 Stat. 56 (1996), is codified throughout Title 47 of the United States Code.

^{2/} A third issue was raised in Count II of MCI's complaint, but that count will be dismissed by stipulation.

established substantive standards that dictate the prices new entrants will pay for access to network elements and to services purchased for resale. Congress instructed the FCC to implement the Act by issuing regulations that set forth in detail the incumbent LECs' obligations to provide access to local networks and to price that access in accordance with the Act.

The DTE erred in applying these network access and pricing rules. First, although the DTE properly determined that a "forward-looking" cost methodology must be used for setting prices for unbundled network elements, see 47 U.S.C. § 252(d)(1), it adopted cost studies proposed by BA-MA that depart in one critical respect from that forward-looking methodology. Forward-looking costs reflect use of the most efficient available equipment, see 47 C.F.R. § 51.505(b)(1), but the DTE measured costs of a key network element by assuming the use of a less efficient technology. That assumption also violated the FCC's rule against padding rates for unbundled network elements in order to subsidize other services unrelated to the use of those elements. See id. § 51.505(d)(4). Second, the DTE failed to enforce the Act's requirement that incumbent LECs provide network elements in combined form, as they exist in the incumbents' network. The DTE's decision to relieve BA-MA of that obligation cannot stand in light of the Supreme Court's recent decision in AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999), which definitively upheld the FCC rule requiring provision of combinations of network elements. See id. at 737-38. The DTE itself recently has recognized this, but BA-NY has sought to deny the effect of the Supreme Court's decision.

The DTE's failure to carry out the mandate of the Act and the FCC's rules will hamper "the expeditious introduction of competition into local [tele]phone markets." Iowa Utils. Bd. v. FCC, 120 F.3d 753, 816 (8th Cir. 1997), aff'd in part and rev'd in part, sub nom. AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999). The terms of the Act require this Court to review interconnection agreements such as the one at issue in this case and rectify errors, like those here, that frustrate the requirements and purpose of the Act. 47

U.S.C. § 252(e)(6). Congress wanted real local competition to emerge "as quickly as possible." H.R. Rep. No. 104-204 at 89 (1995) ("H. Rep."). The terms MCI seeks to have included in the agreement will further that objective. Without those terms, Massachusetts consumers will not fully realize the benefits Congress intended -- lower telecommunications prices, better service, and more choices.

BACKGROUND

A. The Telecommunications Act of 1996

Congress enacted the 1996 Act to end the monopoly regime that prevailed in the market for local telephone service across the country for most of this century and to replace it with a vibrant competitive market that will bring lower prices and better service to consumers "as quickly as possible." H. Rep. at 89; see Iowa Utils. Bd. v. FCC, 120 F.3d at 816. As Congress realized, however, making local phone markets competitive would require sweeping and arduous changes in the manner in which the local telephone market is regulated.

1. The Pre-1996 Act Regulatory Regime

Before passage of the 1996 Act, the Communications Act of 1934 divided responsibility for regulating telecommunications markets into well-defined (albeit overlapping) spheres: federally-regulated interstate long-distance services and state-regulated intrastate services. 47 U.S.C. § 152; see Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986). States typically granted a single company such as BA-MA an exclusive monopoly franchise to provide local service within a defined territory. See AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. at 726. Under this protective umbrella, incumbent LECs were able to build up the vast telecommunications infrastructure (called the "local network") that connects virtually every home and business in a local service area. See H. Rep. at 49 ("[local] telephone companies have historically been protected from competition by State and local government barriers to entry").

States generally applied a "rate-of-return" approach to regulating monopoly providers of local service. Regulators calculated a firm's overall costs on the basis of the firm's operating expenses and its investment in plant and equipment. Rates for consumers were set at a level designed to allow the firm to cover its operating costs and to earn a "rate of return" on its capital investment. Because the regulated firm's profits increased as its spending increased, see National Rural Telecom Ass'n v. FCC, 988 F.2d 174, 178 (D.C. Cir. 1993), the states' rate-of-return regulation created incentive for incumbents to overinvest in, or "goldplate," their networks. See M. Kellogg et al., Federal Telecommunications Law 478 (1992) ("Kellogg") (noting that gold-plating, "while attractive, does not represent real, useful, value"). Although state regulators scrutinized incumbents' investments, disallowing costs that were not prudently incurred, overinvestment was generally extremely difficult to detect and prevent. See Harvey Averch & Leland L. Johnson, Behavior of the Firm Under Regulatory Constraint, 5 Am. Econ. Rev. 1052, 1062-63 (1962) .

Another difference between conditions under the pre-1996 "rate-of-return" regime and those that would prevail in a competitive market is that during this period states generally set prices on the basis of "historic," rather than "forward-looking," costs. Under the "historic-cost" approach, rates are based on the costs recorded on a phone company's books to reflect its historic outlays in constructing and operating the telephone plant it uses to provide service. In a competitive market, in contrast, prices are based on "forward-looking" costs -- that is, the costs that an efficient competitor would incur today to provide the same good or service.

In addition, traditional rate-of-return regulation produced a third departure from the conditions that would obtain in a competitive market. To provide "universal service" for all consumers -- that is, to ensure that local telephone service is provided at affordable rates in all parts of the country -- states set retail rates for some classes of customers that grossly exceeded the cost of serving those customers, in order to generate hidden "implicit"

subsidies which would allow retail rates for other classes of customers to be set below cost.³ For example, states charged rates well above cost for business lines, residential lines in urban areas (where costs are generally low), and a wide variety of other services in order to provide low residential rates for consumers in rural areas, where service costs are high. See In re Federal-State Board on Universal Service, Report and Order, 12 F.C.C.R. 8776, ¶¶ 11-12 (1997) ("Universal Service Order"). In other words, the rates consumers paid for local service during the monopoly-era regime were not based on any measure of cost. The result was "a rat's nest of implicit subsidies and accounting sleight-of-hands utterly unsuited to a competitive marketplace." P. Huber, M. Kellogg, J. Thorne, The Telecommunications Act of 1996 55 (1996); see also Universal Service Order ¶ 11.

2. The Sweeping Reforms of the 1996 Act

In the 1996 Act, Congress radically changed the allocation of regulatory authority that had existed under the 1934 Communications Act, as well as the substantive policies that had prevailed under the old regime. It replaced them with a uniform national policy of competition in local telecommunications markets. Congress eliminated prior state monopoly franchises by preempting all state laws and regulations that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Congress also legislated an end to the prior system of hidden, implicit federal subsidies for universal service, recognizing that such subsidies are inconsistent with a competitive market. Id. § 254. To ensure affordable service for all, Congress replaced the old system with a new regime of separate, "explicit," competitively neutral subsidies. Id.

^{3/} An "implicit subsidy" results when a single monopoly phone provider charges above-cost rates for one service in order to subsidize low rates for other services offered by it. In re Federal State Board on Universal Service, Report and Order, 12 F.C.C.R. 8776, ¶ 10 & n.15 (1997) ("Universal Service Order"). An "explicit subsidy" is not hidden in this fashion, but is instead provided for by a separate fund set aside specifically for that purpose.

Most importantly, Congress recognized that merely removing these legal impediments alone would not make local markets competitive. In the near term, potential competitors such as MCI are unlikely to be able to replicate the existing telecommunications infrastructure "because the investment necessary is so significant." H.R. Conf. Rep. No. 104-458, at 148 (1996) ("Conf. Rep.").⁴ As the Eighth Circuit has explained, "Congress recognized that the amount of time and capital investment involved in the construction of a complete local stand-beside telecommunications network are substantial barriers to entry." Iowa Utils. Bd., 120 F.3d at 816. Congress thus adopted uniform substantive federal requirements authorizing new entrants to make use of existing local networks "to hasten the influence of competitive forces in the local telephone business." Id.

Section 251 of the Act establishes three complementary routes new entrants can use to compete in local markets, each involving different economic characteristics and different physical arrangements. The first is pure "facilities-based" competition -- that is, the construction of new competing networks. To enable the customers of a new entrant providing service through its own network facilities to make calls to and receive calls from the incumbent's customers, Congress required all telecommunications carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a)(1). Although mandatory "interconnection" makes pure facilities-based competition possible, this form of competition may take years to emerge because it requires such significant investment. Pure facilities-based competition would, for example, require a new entrant to build a separate (and costly) line to every individual customer it wished to serve.

^{4/} The FCC reported that an investment of more than \$29 billion would be required today to construct local networks capable of reaching even 20 percent of available subscribers. In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, 11 F.C.C.R. 14171, ¶ 7 & n.15 (1996).

The second method of entry is "resale." Incumbent LECs such as BA-MA must permit new entrants to purchase their retail services at wholesale rates so that new entrants can compete by reselling these services under a different brand to retail customers. Resale allows quick market entry. Resale is an "important entry strategy for many new entrants, especially in the short term when they are building their own facilities." In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report & Order, 11 F.C.C.R. 15499, ¶ 907 (1996) ("Local Competition Order"); see also H. Rep. at 72, 202-03 (resale "duty is important in order for non-facilities-based carriers to have an opportunity to compete in the local exchange market, in the same way that it was critical initially for the early development of competition in the long distance market").

The Act's third route for entry is the leasing of individual elements of the incumbent LEC's network. Section 251(c)(3) requires incumbents to provide to new entrants "nondiscriminatory access to network elements on an unbundled basis . . . in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service." New entrants choosing this route may lease some or all of the elements that make up the local network and use them alone, or in conjunction with their own facilities, to offer competitive local phone service. But this entry strategy would not produce true competition -- or economically efficient retail prices for consumers -- if the rates incumbents charged new entrants were too high to allow new entrants to price their own retail offerings competitively. Congress thus required that these rates be "just, reasonable, and nondiscriminatory" and "based on the cost . . . of providing" the element. 47 U.S.C. §§ 251(c)(3), 252(d)(1). Moreover, Congress specifically prohibited the traditional "rate-of-return" proceedings in which state regulators set monopoly rates on the basis of the incumbent's historic costs. Id. § 252(d)(1).

In requiring cost-based pricing, Congress consciously emulated the actions of several progressive states that had adopted (or were exploring) pricing based on forward-

looking, incremental price methods as an alternative to the "historic cost" methodology traditionally used in rate-of-return proceedings. See Local Competition Order ¶ 631 & n.1508; see also S. Rep. No. 104-230, at 5 (1995). Firms in a competitive market must set prices based on forward-looking costs because new entrants — which are building facilities using the lowest cost, most efficient technology available, valued at current prices — will do so. If a firm faced with efficient competitors were to continue to set its rates based on its inflated, historic costs, it would be driven out of business. See MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1117 (7th Cir. 1983); GTE South Inc. v. Morrison, 6 F. Supp. 2d 517, 530 (E.D. Va. 1998). Setting prices at forward-looking costs thus furthers the 1996 Act's goal of creating efficient competition as quickly as possible. As one court has explained, because such an approach "simulates competitive, as opposed to monopolistic, forces, it facilitates rapid entry into the local telephone service market and thereby serves the overriding and principal goal of the Act." Southwestern Bell Tel. Co. v. AT&T Communications of Southwest, Inc., No. A97- CA-132 SS, 1998 WL 657717, at *13 (W.D. Tex. Aug. 31, 1998) (Tab A); see also Potomac Elec. Power Co. v. ICC, 744 F.2d 185, 189 (D.C. Cir. 1984) (forward-looking prices are a "surrogate" for competition in industry where competition itself has not yet taken root).

3. Implementing the Act's Substantive Requirements

The 1996 Act also sets forth procedures for translating these substantive federal statutory requirements into action. Congress authorized new entrants such as MCI to request interconnection, access to network elements, and resale, and it required incumbent LECs like BA-MA to negotiate with new entrants over these items. 47 U.S.C. § 251(c)(1). Anticipating that incumbents would be unlikely to agree to terms that could threaten their monopolies, Congress gave state public utility commissions (or, if they are unwilling, the FCC) authority to adjudicate all issues that could not be resolved through negotiation. The Act refers to this process as "arbitration." The arbitration process results in an